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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA- SAN JOSE DIVISION
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11 LYNDA FRAYO,
12 Plaintiff,
13 v.
14 THE PARKINSON'S INSTITUTE, a
California Corporation, and DOES 1-50
15 Defendants.
16

CASE NO. C-07-04942-JF

DEFENDANT
THE PARKINSON'S INSTITUTE'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF RULE
12(f) MOTION TO STRIKE
PRAYER FOR ATTORNEY FEES.

Date: November 2, 2007
Time: 9:00 a.m.
Courtroom: 3, 5th Floor

18 I.
19

Introduction

20 By this motion, Defendant THE PARKINSON'S INSTITUTE respectfully requests the
21 Court to issue an Order striking paragraph 4 of plaintiff LYNDA FRAYO's Prayer (Plaintiff's
22 Complaint for Damages, page 7, line 15), pursuant to Federal Rule of Civil Procedure 12(f). Said
23 paragraph seeks damages that are not recoverable as a matter of law.
24

II.

Statement of Facts

25 Plaintiff's Complaint for Damages was filed on July 26, 2007 in the Superior Court of
26 California, County of Santa Clara. Defendant was served on August 23, 2007. Defendant filed a
27
28

1 Notice of Removal in the Northern District of California, San Jose Division and in the Superior
 2 Court of California, County of Santa Clara, on September 24, 2007.

3 Plaintiff's Complaint sets forth a single cause of action for wrongful termination in
 4 violation of public policy. As part of her prayer for relief, plaintiff includes paragraph four:

5 Wherefore, Plaintiff prays for judgment against
 6 Defendants, and each of them, as follows:
 7
 8

4. For costs of suit and attorney fees.

9 Complaint for Damages, pg. 7, line 4. Plaintiff asserts no statutory or contractual basis for her
 10 claim for attorney fees. *See, Complaint for Damages.*

11 III.

12 Law and Argument

13 Pursuant to *Federal Rule of Civil Procedure 12(f)*, a court may "order stricken from any
 14 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous
 15 matter." Fed. Rule of Civ. Proc. 12(f). "Under Rule 12(f), courts have authority to strike a
 16 prayer for relief seeking damages that are not recoverable as a matter of law." *Jacobsen v. Katzer*,
 17 2007 U.S. Dist. LEXIS 63568 *11-12 (N.D.Cal. 2007); See also, *Wells v. Board of Trustees of*
 18 *Cal. State Univ.*, 393 F.Supp.2d 990, 994-95 (N.D. Cal. 2005); *Arcilla v. Adidas Promotional*
 19 *Retail Operations, Inc.*, 488 F.Supp.2d 965, 968 (C.D.Cal.2007); *Tapley v. Lockwood Green*
 20 *Engineers, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974.)

21 Under California law, a prevailing party may not be awarded attorney fees unless such
 22 recovery is specifically provided for by statute or by agreement between the parties. Cal. Code of
 23 Civ. Proc. § 1021.

24 In her Complaint for Damages, plaintiff Frayo sets forth a single cause of action for the
 25 tort of wrongful termination in violation of public policy. She alleges no statutory or contractual
 26 basis for her claim of attorney fees, and without a statutory or contractual basis, she is not entitled
 27 to such an award. Because plaintiff is not entitled to attorney fees regardless of the outcome of
 28

1 this matter, the court should strike plaintiff's prayer for attorney fees as a matter of law.
2

3 **IV.**

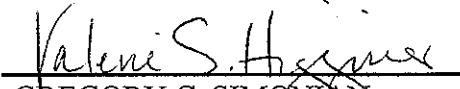
4 **Conclusion**

5 For the reasons stated above, this defendant The Parkinson's Institute respectfully requests
6 this Court to issue an Order striking paragraph 4 of plaintiff's prayer for relief.

7 DATED: September 26, 2007

CLAPP, MORONEY, BELLAGAMBA
8 and VUCINICH

9 By:

10 
11 GREGORY C. SIMONIAN
12 VALERIE S. HIGGINS
13 Attorneys For Defendant
14 THE PARKINSON'S INSTITUTE